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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34505

EAST BROOKFIELD & SPENCER RAILROAD, LLC — LEASE AND OPERATION EXEMPTION — CSX TRANSPORTATION, INC.

Decided: September 15, 2005

This decision denies a request of the United Transportation Union (UTU) that we revoke the notice of exemption filed by East Brookfield & Spencer Railroad, LLC (EB&SR), to acquire by lease (herein, the Track Lease Agreement), and to operate as a common carrier, approximately 4 miles of rail line and approximately 270 feet of lead track in East Brookfield and Spencer, Worcester County, MA.

BACKGROUND

Prior to October 2004, CSX Transportation, Inc. (CSXT), used three auto ramps in Massachusetts to unload automobiles from railroad cars into parking areas to await truck transportation to retail automobile dealers. According to CSXT, operations at the auto ramp located in Framingham, MA (Framingham Auto Ramp), are restricted by local ordinances that curtail the hours of operation, regulate headway time between the departure of trucks picking up automobiles, and otherwise bar expansion at that location. Because General Motors (GM), a shipper served by CSXT at the Framingham Auto Ramp, expressed concerns over these operational limitations, CSXT sought to develop a new auto ramp to serve GM (the Facility).

To that end, CSXT located land suitable for the Facility, in East Brookfield and Spencer, MA. The owner of the land, the Seven Mile River Nominee Trust (Seven Mile Trust), was interested in the project, but only if its principals, who had prior experience operating distribution facilities, could operate the Facility. CSXT agreed to the condition, and the Seven Mile Trust sold the land as part of a like kind exchange under the United States Tax Code to Holston Land Company (Holston), a noncarrier land holding company affiliated with CSXT. Holston then leased the land to CSX Real Property, Inc. (CSX Real Property), a wholly owned subsidiary of CSX Corporation. CSX Real Property developed the Facility and subleased it to Northeast Vehicle Services, LLC (Northeast), an entity formed by the principals of the Seven Mile Trust to operate the Facility. Because Northeast wanted to control its own rail operations at the Facility, it formed EB&SR to perform switching services there, and to interchange rail cars with CSXT.

On May 12, 2004, EB&SR, as a noncarrier, filed a notice under the Board's class exemption at 49 CFR 1150.31 to acquire by lease from CSXT and to operate the aforementioned

line and lead track. The exemption took effect on May 19, 2004. EB&SR had stated that it would begin common carrier operations on or after that date. Notice of the exemption was served and published in the Federal Register on June 8, 2004 (69 FR 32094).

UTU filed a petition to revoke the exemption on October 21, 2004. UTU indicated in its petition that it intended to obtain discovery from EB&SR, and that it would supplement its petition to revoke upon the completion of discovery. On November 10, 2004, EB&SR filed a reply to UTU's petition to revoke.

On October 21, 2004, UTU served on EB&SR a request for production of various documents. On November 12, 2004, in response to UTU's document production requests, EB&SR requested a protective order under 49 CFR 1104.14 with respect to documents produced in discovery in this proceeding. The Board issued the requested protective order in a decision served on November 18, 2004.

Following discovery and the Board's handling of related procedural matters, UTU filed a supplemental petition to revoke on December 20, 2004. On January 14, 2005, EB&SR and CSXT filed their replies to the supplemental petition.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10502(d), we may revoke an exemption as applied to a particular transaction if we find that regulation of the transaction at issue is necessary to carry out the rail transportation policy (RTP) in 49 U.S.C. 10101. The party seeking revocation has the burden of proof, and petitions to revoke must be based on reasonable, specific concerns demonstrating that regulation of the transaction is necessary. And the exemption is void ab initio if the notice contains false or misleading information. See Bulkmatic Railroad Corporation — Acquisition and Operation Exemption — Bulkmatic Transport Company, STB Finance Docket No. 34145, et al. (STB served Nov. 19, 2002).

In its petition to revoke, UTU argues that this transaction does not fall within the class exemption at 49 CFR 1150 Subpart D, that regulation of the transaction is necessary to carry out the rail transportation policy of 49 U.S.C. 10101, and that the notice contains false or misleading information.

In its supplemental petition to revoke, UTU also argues that the transaction is a device to move jobs from under a collective bargaining agreement between CSXT and UTU to a nonunion carrier, EB&SR. UTU asserts that EB&SR was created for the transaction at issue, that the transaction involves a sale and leaseback of property, and that CSXT maintains significant control over the operation of the track involved in the transaction and the property on which it is located. In exhibits to its supplemental petition, filed under seal, UTU submits documents obtained in discovery to support its allegations.

In response, EB&SR argues that UTU has not raised any specific or particularized concerns in support of its assertions and thus has not satisfied UTU's burden of proof for revoking the exemption for this transaction. EB&SR asserts that there is no "identity in interest" between CSXT and EB&SR and that the transaction was an arm's-length sale to a third party purchaser, and, accordingly, is distinguishable from Sagamore National Corporation — Acquisition and Operation Exemption — Lines of Indiana Hi-Rail Corporation, Finance Docket No. 32523 (ICC served Aug. 26, 1994) (Sagamore), decided by the Board's predecessor, the Interstate Commerce Commission, and cited by UTU in support of its contentions. According to EB&SR, unlike in the Sagamore case, the two companies here have no corporate affiliation and no officers or directors in common. Moreover, EB&SR states that it was created for a legitimate business goal: to provide more efficient service and reduce dwell time, making the Facility more marketable to vehicle manufacturers.

EB&SR asserts that the various provisions of its agreements with CSXT cited by UTU are not evidence of a sham transaction. To the contrary, EB&SR submits that the provisions are unremarkable, especially in the context of lease transactions, and are clearly appropriate. Moreover, EB&SR maintains that many of the questioned provisions have been found to be acceptable in prior agency proceedings. EB&SR specifically identifies a number of track lease and sublease provisions to demonstrate its independence from CSXT. EB&SR denies that CSXT exercises undue control over it, stating that it is independent of, and not affiliated with, CSXT, and that it operates under its own name with its own employees, management, and equipment.

Like EB&SR, CSXT contends that UTU has not specifically shown that any portions of the notice are false or misleading. CSXT states that EB&SR is a separate and independent entity, and that the lease was an arm's-length transaction conducted for legitimate business purposes. CSXT confirms that the Facility was built to alleviate GM's concerns over the operational limitations of the Framingham Auto Ramp. It further confirms that EB&SR was created not to evade a collective bargaining agreement but because the principals of Northeast and the Seven Mile Trust conditioned their agreement with CSXT on operating the Facility, including performing rail switching services, themselves.

According to CSXT, neither CSXT nor any of its affiliates has any control over, or interest in, Seven Mile Trust, Northeast, or EB&SR. Although it acknowledges that it has a close working relationship with EB&SR, CSXT asserts that the contractual relationship between the two railroads is essentially no different than CSXT's relationships with other shortline railroads with which it connects. CSXT argues that, because EB&SR is a separate, independent entity, the transaction covered by EB&SR's notice of exemption is a bona fide transaction based on substantial business reasons and was not intended to remove jobs from workers under a UTU collective bargaining agreement with CSXT.

Our general policy is that an entity seeking to revoke an exemption such as this must present not just generalized concerns, but rather some specific, particularized, and reasonable cause for concern in order for us to revoke an individual use of this class exemption. See

Meridian Southern Railway, LLC — Acquisition and Operation Exemption — Line of Kansas City Southern Railway Company, STB Finance Docket No. 33854, slip op. at 3 (STB served Aug. 29, 2000). Here, UTU has not articulated any “reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and regulation of the transaction is necessary.” See MVC Transportation, LLC — Acquisition Exemption — P&LE Properties, Inc., STB Finance Docket No. 34462 *et al.*, slip op. at 7 (STB served Oct. 20, 2004). In these circumstances, regulation by this agency of EB&SR’s proposed transaction is not necessary to carry out the RTP.

The evidence does not support a claim that the transaction is a sham. Notwithstanding the importance of switching service to them, line haul carriers sometimes choose to concentrate on providing line haul service and to rely on local carriers to provide switching or other feeder line service. Often, the industries that receive such service prefer to deal with a local switching carrier. UTU’s claim that the transaction was not motivated by a desire of the parties to realize legitimate business goals but was instead a device created merely to shift jobs onto a nonunion carrier, overlooks the fact that EB&SR is a financially independent business entity that is not affiliated with CSXT. See G&MV R. Co. — Exempt. — Consolidated Rail Corp., 9 I.C.C.2d 1249, 1255 (1993) (where financial independence is present, shared facilities and coordination of operations carry little weight in demonstrating that one carrier is the alter ego of another). UTU has failed to show that EB&SR has entered into the agreements for a reason other than to satisfy customer concerns and obtain the benefit of the terms contained therein.

Nor do the provisions of the agreements demonstrate that EB&SR is merely an alter ego of CSXT. Certain provisions of the contracts between the two carriers give CSXT some influence over EB&SR’s performance. For example, certain provisions, as noted by EB&SR, state that: (1) EB&SR is required to use CSXT’s safety rules and regulations and radio frequencies on the track, (2) EB&SR is precluded from making alterations to the track without CSXT’s consent, and (3) CSXT may access the Facility. However, provisions like these are not unusual in a contract between a switching carrier and the line haul carrier with which it connects.

Other provisions of the agreement demonstrate EB&SR’s independence. EB&SR bears the full financial risk of its operations, is subject to the Railroad Retirement Tax, hires its own employees, sets its own rates and charges, and leases its own locomotives. Although CSXT has required that EB&SR name it as an additional insured on its liability insurance, EB&SR carries its own insurance, and is responsible for day-to-day operations on the line.

Additionally, UTU has not articulated any basis for the Board to revoke the notice as contrary to the RTP. To obtain a revocation, the petitioner must demonstrate that greater regulatory scrutiny is necessary to carry out the RTP. Here, the concern expressed by UTU is that CSXT positions will be moved to a non-union carrier, thus assertedly harming CSXT employees. But the statute makes clear that labor protections cannot be imposed on acquisitions by noncarriers under section 10901. 49 U.S.C. 10901(c). We see no basis for finding that the labor impacts are so severe as to warrant greater regulatory scrutiny for the transaction through a

more formal process, as opposed to allowing it to proceed under the class exemption procedures. Indeed, UTU has failed to show that the labor impact here is different in character from or greater in degree than the impacts typically associated with the acquisition of track by a new carrier. UTU has not rebutted either the presumption in 49 U.S.C. 10901(c) that such acquisitions are consistent with the public convenience and necessity, or the presumption reflected in the class exemption that such acquisitions do not warrant detailed Board scrutiny to carry out the RTP. Accordingly, we find no basis to revoke EB&SR's exemption.

Finally, as noted by EB&SR, UTU has not stated any facts in support of the allegation made in its original petition to revoke that the transaction does not fall within the noncarrier line acquisition class exemption.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. UTU's petition to revoke EB&SR's notice of exemption is denied.
2. This decision is effective on its date of service.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary